Filed 2/7/19 Baker v. County of Orange CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THOM BAKER, Plaintiff and Appellant, v. COUNTY OF ORANGE, Defendant and Respondent.	G053988 (Super. Ct. No. 30-2015-00769166) ORDER DENYING REQUEST FOR PUBLICATION AND MODIFYING OPINION; NO CHANGE IN JUDGMENT

Appellant has requested that our opinion, filed on January 10, 2019, be certified for publication. Our opinion does not meet the standards set forth in California Rules of Court, rule 8.1105(c), and the author is concerned that the burgeoning number of reported decisions has already become a near-unmanageable burden for attorneys. The request is DENIED.

Pursuant to California Rules of Court, rule 8.1120(b), the clerk of this court is directed to forward a copy of our opinion, this order and the request for publication to the Supreme Court.

It is hereby ordered that the opinion be modified in the following particulars:

1. On page 12, first sentence after the heading "*3. Future Amendment of Complaint*" the word "Country" should be "County."

This modification does not effect a change in the judgment.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.

Filed 1/10/19 Baker v. County of Orange CA4/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THOM BAKER, Plaintiff and Appellant, v. COUNTY OF ORANGE, Defendant and Respondent.	G053988 (Super. Ct. No. 30-2015-00769166) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick P. Aguirre, Judge. Reversed.

Castillo Harper, Brandi L. Harper and Michael A. Morguess for Plaintiff and Appellant.

Leon J. Page, County Counsel, and Adam C. Clanton Deputy County Counsel for Defendant and Respondent.

I. INTRODUCTION

Thom Baker (Baker) sued his current employer, the County of Orange, claiming he was entitled to be reclassified from engineering technician III to senior project manager. Baker alleged that he was assigned the duties of a senior project manager in the parks and recreation department in a 2009 reorganization. He asserted proper classification according to his actual duties would entitle him to a retroactive pay increase as well as an increase in current pay. The County successfully demurred on the theory Baker had failed to exhaust his administrative remedies by not submitting a request to his union, the OCEA. Baker, said the County, was required under a memorandum of understanding (the contract) between the County and the OCEA to first approach the union for reclassification.

We reverse. The doctrine of administrative remedies does not apply unless there is an adequate remedy. That is not the case here. Here, there are two major gaps in the contract:

(1) The contract does not address the situation where, as here, an employee requests his or her department to be reclassified, the department then *agrees* with that request and forwards it on to the human resources department (HR), but HR just sits on the request indefinitely.

(2) Even if Baker had done everything possible under the contract, including contacting his union, the *best* he was guaranteed was only an "advisory" opinion from an outside consultant that would not be binding on the County. It would be like hunting for and discovering the lost city of El Dorado only to find there was no gold there.

II. FACTS

Because this case comes to us on demurrer, we take the facts from the pleadings. Here, those pleadings consisted of an original complaint filed in January 2015, a first amended complaint (1AC) filed in April 2015, and finally a second amended complaint (2AC) filed in December 2015.

Baker had been an engineering technician III for the County since 1987. In 2009, the County reorganized its parks and recreation department and assigned Baker there. After the reassignment, Baker found himself performing the duties of a senior project manager though he remained an engineering technician III. This included being responsible for the County's job order contracting program, pavement management and also capital improvement projects. According to his pleadings, had he been formally reclassified as a senior project manager he would have been entitled to 40 percent higher pay.

Baker soon communicated a request for reclassification and more pay to about seven County managers. He was assured by four of those managers that he should be reclassified as a senior project manager. In March 2013, at the direction of one of those managers, (the director of OC Parks), Baker submitted a completed classification questionnaire to the County's central project office. That same month his request for reclassification was forwarded to HR with a memo written by the manager of the central project office recommending a classification study be conducted.

And there the request sat. A director in HR put Baker's request "'on hold'" pending a proposed reorganization of the County's central project office. In July 2014, after waiting over a year, Baker requested a meeting with that manager. The manager

refused to see Baker and referred him to the OCEA. Since Baker's request had already been consigned to HR limbo,[1] Baker filed this suit in December 2015.

Baker's original and 1AC each met with demurrers based on the absence of an allegation Baker had exhausted in his administrative remedies as required under the contract, specifically "Step 2.A." (of Section 3 of Article XIX) concerning the treatment of employee requests for reclassification. The trial court read Step 2.A.to require an allegation Baker had submitted a request to the union. By Baker's 2AC he had included the OCEA as a named defendant, but still had not alleged a request to it; he simply asserted no formal request was necessary. The trial court then sustained the demurrer to the 2AC, this time without leave to amend, adding that Baker's argument against the necessity of contacting the union "amount[ed] to an untimely motion for reconsideration." From the ensuing judgment Baker has appealed.

III. DISCUSSION

A. *Exhaustion*

For the doctrine requiring exhaustion of administrative remedies to apply, there must *be* a remedy. (E.g., *Palm Medical Group, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206 [no requirement clinic seeking admittance to preferred provider network ask medical review committee to reconsider denial of clinic's application, ergo no exhaustion requirement]). And that remedy must be adequate. (E.g., *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 Cal.App.4th 587, 611 [general and individual rent adjustment applications did not provide for adequate remedy under rent control statutory scheme that required landlords to pay interest on tenants' security deposits].) Here, we are forced to conclude the union contract not only gives employees seeking reclassification in the face of an HR pocket veto an *inadequate*

[1] In its briefing the County uses the word "purgatory" to refer to what happened to Baker's written request. A better metaphor would be limbo. One eventually gets out of purgatory and goes to a better place.

remedy, it turns out when we reach the end of the contract it gives such employees no remedy at all.

1. *No Adequate Remedy for HR Pocket Veto*

There are three sections of the contract bearing on this appeal in the record. They are Article II (governing pay practices), Article X (governing grievance procedures), and Article XIX, which addresses position classification. Because contracts should be read as a whole (Civ. Code, § 1641), we examine all three Articles.

We find in Article II, concerning pay, exactly what might be expected in a union contract involving pay practices – protections for employees. Of relevance to Baker's claim are provisions that protect employee compensation in the event of reassignment. These protections are locked into the word "shall." Section 5 of Article II provides that if a regular employee (like Baker) is assigned to a class with a "higher recruiting step," the "employee's salary *shall* be advanced" by a certain number of steps. (Italics added.)

Next up is Article X, about grievances. It opens with a sentence in which the operative word is "may." Section 1.A. states: "A grievance *may* be filed if a management interpretation or application of the provisions of this Memorandum of Understanding adversely affects an employee's wages, hours or conditions of employment." (Italics added.)

But whether an employee even "may" file a grievance is then curtailed in a list of exceptions to grievances set out in Section 1.B. That section *excludes* the subject of "position classification" from the scope of the grievance procedures set forth in Article

X. If a regular employee (like Baker) is in an official classification that doesn't fit his or her actual work, the employee *can't* file a grievance.[2]

Rather, the whole topic of "position classification" is specifically addressed in Article XIX. In fact, "position classification" is that article's title. Since the trial court relied on Article XIX in sustaining the County's demurrer, we parse Article XIX, section by section, and subsection by subsection. We provide the exact text in the margin to be as transparent in our explication of the text as possible.

The focus of Section 1 is the creation of new classes of employees, and so does not apply to Baker's situation at all.[3] Individual classifications and reclassifications are, rather, the subject of Section 2.[4] Section 2's point is that Sections 3 and 4 would govern those classifications. This brings us finally to Section 3, which is the crux of the County's exhaustion of administrative remedies defense.

Section 3, Step 1 says that employees who believe their position is not properly classified "may submit a written request" to their department head asking that a "classification study be conducted." If such a request is made, it "shall state the reasons" the employee believes the current classification is not appropriate and which

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[2] Section 1.B. states: "Specifically excluded from the scope of grievance are: [¶] 1. subjects involving the amendment or change of Board of Supervisors resolutions, ordinances or minute orders, which do not incorporate the provisions of this Memorandum of Understanding; [¶] 2. matters which have other means of appeal; [¶] 3. *position classification*; [¶] 4. performance evaluations with a rating of 'meets' or 'exceeds' performance objectives." (Italics added.)

[3] "Section 1. The Establishment of New Classes [¶] The County will provide OCEA an information copy of the new class specification for any proposed class relevant to this Bargaining Unit. The County agrees to meet and confer with OCEA in an attempt to reach agreement on the salary range and probation period for any such proposed class before submitting the class to the Board of Supervisors for adoption."

[4] "Section 2. Reclassification of a Position [¶] A. Sections 3. and 4. shall apply only to individual classification problems or studies involving small numbers of employees where the issue is a question of allocating a position to the appropriate class. Classification Maintenance Reviews are excluded from the provisions of Sections 3. and 4. [¶] B. Classification Maintenance Review is defined as 1) any study which involves all positions in a class or series except for a class or series with five (5) or fewer positions; 2) any study which involves all positions in an organizational unit which is greater than five (5) positions; 3) any study in which the class concept, minimum qualifications or salary relationship is at issue. [¶] C. By mutual agreement, the County may contract with a consultant to carry out Classification Maintenance Reviews. Provisions of Section 5. will apply."

classification the employee believes is the appropriate one.[5] According to the 2AC, Baker invoked this step, asking his department for a reclassification.

In response to such a request, Section 3, Step 2 begins by enumerating two response options, leaving open the possibility of other responses as well. The two enumerated options are (1) a simple denial of the request for a classification study; or (2) a forwarding of the request to HR.[6]

Here again, Baker did everything he could do. After presenting his request to his department, the department chose option (2). It forwarded his request onto HR.

Then comes Step 2.[7]

Subdivision a. of Step 2 provides that that "If management denies the request or fails to respond within thirty (30) calendar days" then the "employee may submit the request to OCEA for consideration."

It is a misreading of Step 2, subdivision a. to conclude that the reference to "management" failing to respond to "the request" *in 30 days* includes a situation in which HR takes no action. That can't be the case. When we reach Step 4 (which we will in a moment) it turns out that *HR's* deadline to finish a classification study and reach an "appropriate classification" determination is at least *120 days* after the employee completes a certain form. Reading Step 4 in conjunction with subdivision a. of Step 2

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5 "Section 3. Procedure for Requesting Reclassification of a Position [¶] Step 1: An employee who believes his or her position is not properly classified may submit a written request to his or her agency/department head that a classification study be conducted. Requests shall state the reasons the employee believes the present class is not appropriate and which class the employee believes is appropriate based on the employee's present duties. "

6 "Step 2: Appropriate agency/department response to an employee's request for reclassification includes, but is not limited to, denial of request or forwarding of the request to Human Resources Department with a recommendation that a classification study be conducted."

7 Here is the way it is laid out in the contract:

"Step 2: Appropriate agency/department response to an employee's request for reclassification includes, but is not limited to, denial of request or forwarding of the request to Human Resources Department with a recommendation that a classification study be conducted.

"a. If the request is denied, the employee shall be given a written statement of the reasons for the denial. If management denies the request or fails to respond within thirty (30) calendar days, the employee may submit the request to OCEA for consideration."

means that the fails-to-respond-in-30-days clause in Step 2 does *not* refer to HR not responding in 30 days. It refers to the employee's *department* not responding in 30 days.

It would thus have made no difference whether Baker contacted the OCEA to request that HR conduct a study. The most the OCEA could have done would have been to do what Baker's management had already done – forward it to HR – and the result would have been the same inaction by HR.

The inadequacy of recourse to the union, however, is underscored by the next subdivision under Step 2, subdivision b. That subdivision allows employees to present their request to the union when *HR* "studies a position" but "the County" makes a "decision" with which the employee "does not agree."[8] Subdivision b. doesn't address what happens when HR just sits on a request so there is no "decision" to disagree with. The contract is thus silent on the possibility that HR, in a bureaucratic maneuver worthy of the fictional Catbert,[9] just sits on the employee's request.

The contract thus fails to give Baker an adequate remedy in the event of HR inaction. But when we read on, we find that any hope *at all* of redress for misclassification is a chimera.

2. *No Remedy At All*

The next portions of Article XIX (Steps 3 and 4 of Section 3) present a series of scenarios which result in taking the issue of an employee's misclassification out of the hands of HR and putting it into the hands of an outside consultant. Step 3 of Section 3 is addressed to the OCEA in the event an employee does make a "request for study." In that situation, the OCEA "may" request HR to "conduct a classification study

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[8] "b. If the Human Resources Department studies a position at the employee's request as provided above and the employee does not agree with the County's decision, the employee may submit the request to OCEA.

[9] Catbert has made his appearance a couple of times in employment cases. (See, e.g., *Washington v. Illinois Dept. of Revenue* (7th Cir. 2005) 420 F.3d 658, 662 [Catbert is a fictional cat and "the evil director of human resources" in the comic strip Dilbert].)

or "refer the matter to a consultant as provided" in the next step, Step 4.[10] Step 4 follows by requiring HR to determine when the position was "last studied" and whether there has been a "change in duties" that would justify "restudy." Then Step 4 walks the reader through three possibilities depending on whether a study is "justified" or not.[11] It is here we learn that if HR determines a study is "justified," the employee is to be given a position description form in no more than 15 days. And then, after the employee fills out that form, HR has 120 days to notify the OCEA of "the appropriate classification of the position."[12]

The employee who follows all the steps set out in the contract – including enlisting the help of the OCEA in a quest for reclassification – reaches the end of the rabbit hole in Section 5.[13] But all Section 5 guarantees is that an employee can obtain

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10 "Step 3. After receiving an employee request for study, OCEA may request in writing that the Human Resources Department conduct a classification study of the position or refer the matter to a consultant, as provided in Step 4. Such requests are to be timely."

11 "Step 4. The Human Resources Department shall determine when the position was last studied and whether there has been a change of duties or change in classification structure which justifies restudy.

"a. If the study is justified and the request is made under Step 2.A., the employee shall be given a Position Description Form within fifteen (15) days. Within one hundred twenty (120) calendar days after the Human Resources Department receives the completed Position Description Form, the Human Resources Department shall notify OCEA of the appropriate classification of the position.

"b. If the study is justified, and the request is made under Step 2.B., the Human Resources Department shall complete the study in thirty (30) days and communicate the study in thirty (30) days and communicate the results to OCEA. If the study is not completed within thirty (30) days, upon request of OCEA the matter shall be referred to a consultant under the provisions of Section 5. of this Article.

"c. If the study is not justified, the County shall notify OCEA within fifteen (15) days. OCEA may accept the County position that the study is not justified or may request a consultant review as provided in Section 5."

We presume the capital "Step 2.A" and "Step 2.B" referenced in Step 4 should be "a." and "b." There are no capital letter subdivisions in Step 2.

12 Section 4 then imposes a cap on the total number of positions the OCEA may request for reclassification studies – 25.

13 "Section 5. Review of Disputed Position Classification Decisions

"A. If the County does not respond at the end of the appropriate time period as specified in Section 3., Step 4 of this Article or OCEA does not agree with a position classification decision of the County after the steps in Section 2. or 3. of this Article have been followed, the issue may be presented to a classification consultant for advisory review. Other provisions notwithstanding, no more than fifty (50) positions may be referred to a consultant per fiscal year except that any maintenance study done by a consultant shall not be included.

"B. The consultant's review shall be documented on forms supplied by the County and used by the County for documenting its classification decisions.

"C. The consultant shall have access to the organizational and classification files of the Human Resources Department and shall have the right to conduct the classification study in the manner the consultant deems most appropriate.

(whether by himself or herself or via a request from the union) an "advisory" opinion from an outside consultant. Section 5.D. says "[a]ny salary change for any employee" must be effective by a certain date, and then reiterates, in passing, the fact that whatever the consultant does is still "advisory." Indeed, the word "advisory" is the leitmotif of Section 5. It appears twice, and there is no language which compels the County to do *anything* with a consultant's "advisory review."

In fine, even if Baker had done *exactly* as the trial court thought he was required to do and asked his union to do something his department had already done – and we have seen he was not required to do that – all he would receive was the hope the County *might* agree he's been misclassified and then should be *re*classified. That's not a remedy; that's the ability to wait – fruitlessly – for a nonbinding opinion.[14] Baker had no administrative *remedy* to exhaust.

B. *Remaining Miscellaneous Issues*

The County makes three arguments in favor of either affirmance or dismissal of the appeal which are independent of the exhaustion issue.

1. *Failure to Name OCEA in Appeal*

First, the County claims that because the OCEA is an indispensable party, Baker has somehow forfeited his rights on appeal by not "naming" the OCEA *in his appeal*. But appellants need not "name" the respondents against whom they take an appeal – in fact, there isn't even an opportunity to do so. When an appellant files a notice

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"D. Any salary change for any employee resulting from a consultant's advisory recommendation shall be effective no sooner than the beginning of the pay period following the decision of the County at Step 4 of the procedure described in Section 3., above.

"E. A consultant shall be chosen who has experience in conducting position classification analyses for local government agencies. The consultant will be chosen by a committee with an equal number of County and OCEA members. The cost of the consultant shall be shared equally by the County and OCEA."

[14] The County obliquely appears to concede the absence of an adequate remedy for misclassification. On pages 28 and 29 of its respondent's brief, it briefly makes an argument to the effect that the contract really doesn't obligate the County to any given "outcome of a specific classification request," and so Baker has no breach of contract action against the County. The issue is not developed by the County, but in any event runs contrary to Article II with its emphasis on proper pay based on proper classification and undercuts the County's main argument that Baker actually *had* an administrative remedy if only he'd followed the requirement of submitting his request to the OCEA.

of appeal, the appellant identifies the particular *judgment or order* which aggrieves the appellant. There is no need to list all the beneficiaries of that judgment; it is the judgment itself which the appellant challenges on appeal. "The notice is sufficient if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100.) The beneficiaries of those judgments may – or may not – choose to file a respondent's brief. Since the OCEA had been named as a defendant as far back as the 1AC, it is a beneficiary of the judgment and nothing prevents it from filing a brief in this appeal; it simply has chosen not to.

2. *Mootness*

The County tells us that in 2015 (sometime after this action was commenced) Baker was assigned to a different position with different duties.[15] From the fact of this reassignment the County argues Baker's appeal is moot.

The County reasons this way: Baker sued the County in superior court for reclassification. Reclassification, as the County appears to acknowledge (and we have already shown), is explicitly exempted in Article X from the scope of grievances.[16] But, says the County, Baker's job title and duties were changed after the litigation commenced. Therefore, the County reasons, there is no *current* controversy for the superior court to adjudicate as regards classification *qua* classification. Thus, any claim for underpaid wages based on the years of work Baker allegedly did at the senior project manager level (2009 to 2005) is now clearly covered by Article X, which states that employee claims about being underpaid are within the scope of topics that should be aggrieved.[17] And the ultimate culmination of the Article X grievance process is a referral to arbitration under Section 8.[18] Checkmate, says the County.

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15 Apparently project manager III, though we have nothing but the briefing to tell us that.

16 Article X, Section B. 4. expressly excludes the topic of "position classification" from the "scope of grievances."

17 Under the heading "Scope of Grievances" in Section 1.A. of Article X, the contract states: "A grievance may be filed if a management interpretation or application of the provisions of this Memorandum of Understanding *adversely affects an employee's wages*, hours or *conditions of employment*." (Italics added.)

The flaw in the County's reasoning is that proper classification comes before proper pay, and we have just demonstrated that an employee has no remedy when not properly classified. That means a court decree establishing misclassification is a valuable right. Even if the next step after that were a grievance procedure, the County would have to accept the court's adjudication of misclassification. The County would be relegated in the grievance proceeding to contesting *how much* it owed Baker, not whether it owed him anything at all.

3. *Future Amendment of Complaint*

The Country addresses the possibility of Baker's amending his 2AC to add a cause of action seeking a writ of mandate. The County's arguments are all predicated on the assumption that Baker had an adequate administrative remedy and didn't use it. As we have seen that assumption is not correct. Since the case is being returned to the trial court, we express no opinion as to any *future* amendments which Baker may seek to make.

IV. DISPOSITION

The judgment is reversed. Appellant shall recover his costs on appeal.

Though Section 1.A. uses the permissive "may" in giving employees the *right* to file grievances, Section 2. A. of Article X contains bring-it-or-lose language using the word shall: "If an employee does not present a grievance/appeal or does not appeal the decision rendered regarding his or her grievance/appeal within the time limits, the grievance/appeal shall be considered resolved." Reading the two together, we agree with the County that disputes about wage – at least if those disputes arise out of a "management interpretation or application" of the contract – are the subject of grievance procedures.

18 Section 8 on "Referrals to Arbitration" incorporates Steps 1 and 2 of Section 7. The structure is much too complex and convoluted to be worth setting forth in this opinion, and given our determination that the case is not moot, there is no need to do so.

BEDSWORTH, J.

WE CONCUR:

O’LEARY, P. J.

GOETHALS, J.